

IN THE MATTER OF

THOMAS A. BARNES

Petitioner

*

BEFORE THE

*

HOWARD COUNTY

*

BOARD OF APPEALS

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BA Case No. 08-014V

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DECISION AND ORDER

The Howard County Board of Appeals convened on December 2, 2008 to hear the Petition of Thomas A. Barnes for a variance to reduce the minimum lot width from 100 feet to 75 feet to create a lawful lot for a home-based contractor accessory use in an RC-DEO (Rural Conservation-Density Exchange Option) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Regulations").

Board members, James Walsh, Albert Hayes, Maurice Simpkins, Kevin Doyle and Henry Eagles, were present at the hearing and Chairman Hayes presided. The Board members indicated that they had viewed the property as required by the Zoning Regulations. The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The case was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. Prior to the introduction of testimony, the following items were incorporated into the record by reference:

1. The Howard County Code;
2. The Howard County Charter;
3. The Howard County Zoning Regulations;

4. The Department of Planning and Zoning comments letter dated April 25, 2008 with attached aerial photograph of the vicinity;
5. The General Plan for Howard County;
6. The General Plan of Highways;
7. The Variance Petition and Plot Plan submitted by the Petitioner.

P. Christian Dorsey, Esquire, represented the Petitioner. Sang Oh, Esquire, represented Davis Branch Estates in opposition to the Petition. Thomas A. Barnes testified in support of the Petition. The following individuals appeared in opposition to the Petition: Deborah Vigliotti, D. Gregory Cole and A. Paul Boerschel.

Following the Petitioner's presentation, Sang Oh, Esquire, moved for dismissal of the case. For the reasons stated below, the Board determined to grant the motion and dismiss the case.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, the Board makes the following Findings of Fact:

1. The Petitioner is the owner of the subject property situated on the south side of Cavey Lane, about 900 feet east of Woodstock Road, and is also known as 10379 Cavey Lane (the "Property"). The Property is located in the 3rd Election District and is identified on Tax Map 11, Grid 13, as Parcel 28.

2. The 2.56-acre Property is a long, irregularly shaped lot. The front lot line and front section are about 75± feet wide for some distance. The Property then widens to 125 feet. It is accessed by a 10-foot wide driveway near the eastern lot line, which leads to a dwelling situated within the 75-foot wide front section. The stone and gravel driveway continues toward

the rear section of the lot and ends in a parking area behind a 25 foot-wide by 64 foot-deep, 14-foot high pole barn. According to a note on the plot plan attached to the Petition, this barn is situated 50 feet from the side lot line and 150 feet from the rear lot line.

3. When the property was created by deed in 1964, the Zoning Regulations required the then R-40 zoned parcel to have a minimum width of 125 feet at the building restriction line. The current Zoning Regulations require a lot in the RC Zoning District to have a minimum lot width of 100 feet at the building restriction line for lots 3 acres or less in size (Section 104.E.3.). A "building restriction line" is [a] line established on a lot to indicate the setbacks required by the Zoning Regulations for the zoning district in which the lot is located, or the setbacks required by the Subdivision and Land Development Regulations, if more restrictive" (Section 103.A.19).

4. The Petitioner is seeking a retroactive variance from Section 104.E.3.b. of the Regulations to reduce the minimum lot width from 100 feet to 75 feet for a home-based contractor accessory use.

5. The Petition states that the Petitioner obtained a county permit for the accessory use in 2006.

6. All adjoining properties are also zoned RC-DEO and are in residential and farming use.

7. The General Plan's 2000-2020 Policies Map designates the Property as a "Rural Conservation" Area.

8. The petition states that the Property was created on October 27, 1964.

9. Thomas A. Barnes testified that he purchased the subject property with his fiancé in 2001. Mr. Barnes described the dimensions of the property and stated that no other lots on

Cavey Lane had a 75-foot lot width. In reference to the Petitioner's testimony about the lot shape, Mr. Oh stipulated that the subject property was unique or different from the character of the surrounding properties. Mr. Barnes testified and stated that he needed the variance in order to put an addition on his existing home. Mr. Barnes stated that the primary use of his property is residential and that a secondary use of his property would be for a home-based contractor business.¹ Mr. Barnes stated that he does home improvement and concrete construction types of work. During cross-examination, Mr. Barnes acknowledged that he paid \$174,500.00 for his home in 2001. He also admitted that he previously built an addition to his home in 2006.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides that a variance may be granted only if all of the following determinations are made:

- (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.
- (2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the

¹ In reference to the Petitioner's testimony about the home-based contractor permit, Mr. Dorsey submitted exhibit no. 4 - a February 20, 2008 letter from Anthony LaRose, Zoning Supervisor in the Department of Planning and Zoning wherein he wrote "Home-based contractor's permit, HBC-06-001, was issued October 25, 2007, prior to the discovery your property was created in violation of the zoning regulations in effect at that time. As your property did not comply with the zoning regulations in effect at the time it was created and does not comply with the current zoning regulations, it does not meet the definition of a lot or parcel and therefore, cannot support an accessory use."

appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

- (3) That such practical difficulties or hardships have not been created by the owner, provided, however, that, where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.
- (4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

Based upon the foregoing Findings of Fact, and for the reasons stated below, the Board concludes that the requested variance does not comply with Sections 130.B.2.a(1), (2) and (4) and therefore must be denied.

The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that results in a practical difficulty in complying with the particular bulk zoning regulation-Section 130.B.2(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. *See Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995).

The record shows the Property is not 100 feet wide 50 feet from the right-of-way, but somewhere around 75 feet wide. This front lot width is narrower than the smaller lots in the neighborhood, according to Petitioner's Exhibit 3. The Board, therefore, concludes that the

Property's narrowness in its front section is a unique physical condition. The Board notes that the Petitioner did purchase the Property subject to the restriction sought to be varied.

This uniqueness notwithstanding, the determinative issue in this case is whether the Property's unique shape causes the Petitioner practical difficulty or unnecessary hardship in complying with the 100-foot lot width requirement at the building restriction line. The Board concludes that the evidence, as discussed below, does not establish the existence of an unnecessary hardship or practical difficulty. The Board concludes that the Petitioner has not demonstrated practical difficulty or unnecessary hardship where the Property is already improved by an existing dwelling. This conclusion is consistent with the line of cases interpreting "practical difficulty" or "unnecessary hardship" as a denial of reasonable use standard. *See Belvoir Farms Homeowner Association, Inc., v. North*, 355 Md. 259, 734 A.2d 227 (1999) (discussing the interpretation of variance standards). *See also Citrano v. North*, 123 Md. App. 234, 717 A.2d 960 (1997) (holding board of appeals properly denied variance for a deck accessory structure in a 100-foot critical area, finding no unwarranted hardship where property was already developed with a single family dwelling and related improvements), *citing North v. St. Mary's County*, 99 Md. App. 502, 638 A.2d 1175 (1994) ('If reasonable use exists, generally an unwarranted hardship would not.') *North v. St. Mary's*, 99 Md. App. at 517-18, 638 A.2d 1175.

The Board is not persuaded that the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located, will not substantially impair the appropriate use or development of adjacent property, and will not be detrimental to

the public welfare.² This conclusion is necessarily compelled by the absence in the record of substantial evidence concerning the nature of the proposed home-based contractor use being proposed. The Petition states that the “intended use of the property is residential with an accessory use as a home-based contractor” and refers to the 2006 permit the Petitioner obtained for the home-based contractor business. In Section 7 of the Petition, the Petitioner describes the peculiarities of the lot when created, and then simply recites the criteria for granting the variance, offering no explanation as to how the application of the Zoning Regulations would result in practical difficulties or hardships complying strictly with the bulk regulations. In his testimony and Petition of Appeal, the Petitioner stated that if the variance were denied he could not build an addition to his existing house and that he would lose his home-based contractor use license.³

What the Board knows about the proposed accessory use must be gleaned from the plot plan attached to the Petition. This plan is a rough illustration depicting the location of the residence, driveway and parking area, and the accessory use pole barn, but it provides no specific information about their location. A note on the plan states the business operation meets the obligatory setbacks for the use. In response to a Board member question, the Petitioner stated that he uses only one truck in the business, and that he has planted trees to buffer the accessory use from any adjacent neighbors.

Because the Petitioner may continue to use the Property for his residence, the Board is not persuaded that the requested variance is the minimum necessary to make reasonable use of

² In this regard, the Board notes that DPZ did not make a recommendation in its comments on the variance petition, stating, “[t]he Division of Public Services and Zoning Administration is unsure of the purpose for this variance request.”

³ A home-based contractor shall operate only upon approval of a permit by the Department of Planning and Zoning, based upon compliance with the requirements listed above. The permit application shall include a plot plan showing the location and dimensions of structures, parking and storage areas, screening, and driveways, and a description of the proposed use. Zoning Regulations Section 128.C.2.k

the Property. This conclusion, too, is compelled by the insufficiency of evidence about the home-based contractor accessory use.

ORDER

Based upon the foregoing, it is this 12th day of MARCH, 2009, by the Howard County Board of Appeals, **ORDERED:**

That the Petition of Thomas A. Barnes, Petitioner, for a variance to reduce the minimum lot width from 100 feet to 75 feet to create a lawful lot for a home-based contractor accessory use in an RC-DEO (Rural Conservation Density Exchange Option) Zoning District is hereby **DENIED**.

ATTEST:

HOWARD COUNTY BOARD OF APPEALS

Ann Nicholson
Ann Nicholson, Secretary

James Walsh
James Walsh, Chairperson

Dissent
Albert Hayes, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR

Maurice M. Simpkins
Maurice Simpkins

Kevin Doyle
Kevin Doyle

Barry Sanders
Barry Sanders
Assistant County Solicitor

Dissent
Henry Eagles

IN THE MATTER OF

THOMAS A. BARNES

Petitioner

BEFORE THE

HOWARD COUNTY

BOARD OF APPEALS

BA Case No. 08-014V

MINORITY DECISION

This case came on for hearing before the Board of Appeals on December 2, 2008 to hear the appeals petition of Thomas A. Barnes for a variance to reduce the minimum lot width requirement from 100 feet to 75 feet so to create a lawful lot in order that he may be permitted a home-based contractor accessory use in an RC-DEO (Rural Conservation Density Exchange Option) Zoning District. The application for a variance was filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations")

FACTS

The subject property is situated on the south side of Cavey Lane about 900 feet east of Woodstock Road and is also known as 10379 Cavey Lane (the "Property"). The Property is located in the 3rd Election District and is identified on Tax Map 11, Grid 13, as Parcel 28. The 2.56-acre Property is a long, irregularly shaped lot. The front lot line and front section are about 75+ feet wide for some distance. The Property then widens to 125 feet. It is accessed by a 10-foot wide driveway near the eastern lot line, which leads to a dwelling situated within the 75-foot wide front section. The stone and gravel driveway continues toward the rear section of the lot and ends in a parking area behind a 25'-wide by 64'-deep, 14-foot high pole barn. According to a note on the plot plan attached to the petition, this barn is situated 50 feet from the side lot line and 150 feet from the rear lot line. The petition states the Property was created on October 27, 1964. All adjoining properties are also zoned RC-DEO and are in residential and farming use.

The General Plan's 2000-2020 Policies Map designates the Property as a "Rural Conservation" Area.

A lot or parcel is "[a] piece of land described in a Final Plat or Deed and recorded in the Land Records of Howard County in accordance with the laws and regulations in effect at the time of recordation." Zoning Regulations Section 103.88. When the Property was created by deed in 1964, the Zoning Regulations required the then R-40 zoned parcel to have a minimum width of 125 at the building line. The current Zoning Regulations require a lot in the RC Zoning District to have a minimum lot width of 100 feet *at the building restriction line* for lots 3 acres or less in size (emphasis added). Section 104.E.3. Section 103.19 provides that a "building restriction line" is "[a] line established on a lot to indicate the setbacks required by the Zoning Regulations for the zoning district in which the lot is located or the setbacks required by the Subdivision and Land Development Regulations, if more restrictive."¹

Much testimony was presented as to whether or not Petitioner met the requirements for a variance pursuant to Zoning Regulation Section 130.B.2.a., when seeking approval to reduce the 100 foot width zoning requirement to 75 feet so that he may have a contractor accessory use on

¹ This Department of Zoning and Planning conducted a review of the recorded deeds as well as the Subdivision and Zoning Regulations in effect on October 27, 1964, the date Petitioner's parcel was created. The Subdivision Regulations, adopted March 7, 1961, defined "subdivision" as "the division of a parcel of land into three (3) or more lots of parcels for the purpose of transfer of ownership or building development..." The general requirements for the subdivision of land on page 4 state that "The subdivider shall observe the following general requirements and principles of land subdivision:" As the property was created when a larger parcel was divided into only two parcels, it was exempt from the Subdivision Regulations in effect at that time. Therefore, there was *no violation of the Subdivision Regulations* in effect at the time the property was created. The *Zoning Regulations* of Howard County were adopted May 16, 1961. At that time, the property was zoned R-40 (Residential, One and Two Family Detached). Section 5.041 of the Zoning Regulations required properties in the R-40 zone to have a minimum width of 125 feet at the building line, subsequently changed to 100 feet.

the property. A majority of the Board voted to dismiss the petition on grounds that Petitioner does not have a “legal lot” for which a variance may be permitted because the zoning regulations require a lot to be 100 feet wide; the 75 foot width is not a legal width, notwithstanding that the *method* was legal by which Petitioner’s lot was subdivided from a larger parcel in 1964.

DISCUSSION

Although Petitioner is seeking a variance for his property to reduce the legal width dimension of 100 feet to 75 feet, it appears to me that the requirements of Zoning Regulation §130.B.2. are not dispositive of this case.

I frame the issue differently although the result of denial of the appeal petition is the same. In my view, the fundamental question is whether the Board has subject matter jurisdiction to grant a “variance” to reduce a zoning dimension requirement of any property: in this case, 100 foot width to a width of 75 feet to render the property a “legal lot.”

The width size of a lot is a zoning requirement that may only be authorized by legislation of the County Council. Thus as the zoning regulations enacted by the County Council reduced width lot sizes from 125 feet to 100 feet in the RC Zoning District, a change to 75 foot width for Petitioner’s lot must result from similar legislation enacted by the County Council – not by approval of a “variance” by this Board. Such legislative authority of the County Council controls irrespective of whether Petitioner otherwise meets the criteria of Zoning Regulation Section 130.B.2.a.

Variances do not pertain to altering the exterior dimensions of a plot of land but to the use and building requirements of the plot of land within its set boundaries for which a variance is sought. At Section 103.167, Zoning Regulations, variance is defined as “A grant of relief to a

zoning regulation in a specific case concerning *parking requirements or other dimensional requirements* for a zoning district.” (Emphasis added.) “Parking requirements” connote *interior* dimensional requirements. Section 130. B.2.a (1), in particular, provides that a variance pertains to *use of the physical condition* of the lot – not to revision of required exterior lot dimensions:

That there are *unique physical conditions*, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features *peculiar to the particular lot*; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying with the bulk provisions of these regulations. (Emphasis added.)


The Maryland Court of Special Appeals in *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (Md. App. 1995) similarly judicially recognized that a variance pertains to the use of a lot. The variance process requires “a finding that *the property* whereon structures are to be placed (*or uses conducted*) is – *in itself* – unique and unusual in a manner different from the nature of the surrounding properties such that the uniqueness and particularity of the subject property causes the zoning provision to impact disproportionately upon that property.” (Emphasis added.) *Id.* at 426.

While Petitioner has cast his petition for the Board to approve a “variance” to provide legal authority for a lot width of 75 feet, the Board does not have such authority inasmuch as that authority is legislative in nature, within the purview of the County Council. Therefore, the Board does not have subject matter jurisdiction in this case.

Accordingly, the Board does not have jurisdiction to entertain Petitioner’s petition. On this basis, I concur with the Board’s denial of Petitioner’s appeal petition.

Date:

March 12, 2009


HENRY EIGLES
Member of the Board